Rahamah bt Gujing @ Ibrahim & Ors v Liew Vui Yin & Ors (Government of the State of Sabah, third party) and another suit

HIGH COURT (SANDAKAN) — ORIGINATING SUMMONS NOS 24–10 OF 2003 AND 24–11 OF 2003
HAMID SULTAN JC
10 OCTOBER 2008

Civil Procedure — Declaration — Application for — Declaratory relief — Whether legal and procedural requirements satisfied — Whether could be granted as of right — Whether declaratory relief sought against third party may be entertained — Delay in seeking relief — Whether delay was justified

Civil Procedure — Parties — Third party notice — State Government — Plaintiffs registered owner — Whether alienation to plaintiffs done in accordance with law and within provisions of the Sabah Land Ordinance — Whether defendants' claim against third party baseless, unfounded and misconceived

Land Law — Ownership — Claim for — Plaintiffs registered owner — Whether defendants' entry, occupation and cultivation of land lawful — Whether defendants entitled to ownership over land by virtue of native customary rights — Whether defendants acquired rights on land pursuant to s 88 of the Sabah Land Ordinance

The plaintiffs' claim against the defendants herein was in respect of two suits and the subject matter of the dispute between the parties in the first and second suit was in respect of land held under title deed No CL 095333378 located at Sungai Menanggol, Sukau in the District of Kinabatangan, Sabah. The salient facts of this case were as follows, in 1970, under Land Application No 70090469, a group of 27 persons (most of the plaintiffs named herein) applied for a piece of land in Sg Menanggol-Sukau, Kinabatangan. The said land application was subsequently approved in 1973 by the Lands and Surveys Department. The successful applicants then appointed one Abdul Khalik to be their attorney who in turn had appointed Nescajaya Sdn Bhd ie the second defendant in the first suit to be the attorney. On 3 March 1992, a draft title CL 095317856 was issued to the successful applicants. Sometime in 1996, there was a dispute concerning the power of attorney in respect of the defendants in the first suit. At the same time, the Assistant Collector of

Land Revenue, Kinabatangan ('ACLR') had repeatedly wrote and issued notices to the defendants in the first suit to return the draft title, which the defendants had failed and/or refused to do so till date. In view of the above, the Director of Lands and Surveys advised the ACLR vide a letter dated 17 November 1998, that the LA 70090469 and draft title for CL 095317856 be cancelled in accordance with Land Rule r 2(5). This was to enable the heir/inheritors to submit new land applications for the said land. Subsequent to that letter, the LA 70090469 and draft title for CL 095317856 were accordingly cancelled. The heir/inheritors and the remaining successful applicants are the named plaintiffs in this action. On 15 February 2002, the title deed for the said land bearing No CL 095333378 was issued to the plaintiffs. Around 1990–2002, the defendants in the second suit had also applied for the said land. Their applications could not be processed because the land applied for by them was not available. Apparently, the land applied for by the defendants in the second suit overlapped with the lands which had previously been approved to the plaintiffs. By a letter dated 1 July 1993, the land applications of the defendants in the second suit was rejected. However, despite the letter of rejection, the defendants in the second suit had unlawfully entered and cultivated the said land. The plaintiffs alleged that the defendants had unlawfully entered into and were currently occupying the said land, which was registered in the name of the 28th plaintiff. They sought, inter alia, for a declaration that the 28th plaintiff were entitled to vacant possession of CL 095333378 and that the first and/or third defendants and/or other persons unknown to the plaintiffs who had unlawfully occupied the land to deliver vacant possession of the said land to the plaintiffs. The defendants in both suits had also mounted a counterclaim to seek declaratory reliefs in crux to hold to possession. In addition, the defendants in both suits had also filed a third party action against the state government to achieve the same purpose and legitimatise their possession. The issues raised were, inter alia, whether the plaintiffs were entitled to the ownership and possession of the said land; whether the plaintiffs were entitled to any losses and damages in respect of the said land by reason of the occupation of the said land by the defendants and whether the defendants' entry, occupation and cultivation of the said land was lawful.

Held, allowing the plaintiffs' claim in both suits with costs, dismissing the defendants' counterclaim with no order as to costs and claim against the third party with costs:

(1) Declaratory reliefs were discretionary in nature. It cannot be granted as of right. There was a duty and obligation to explain the delay in seeking the relief. In this case, the plaintiffs had filed the action against the defendants sometimes in 2003. The defendants had only issued the

A third party notice on 13 June 2008. The delay was not explained. This by itself was sufficiently fatal to refuse the relief (see para 14(1)(a)).

(2) The nature of relief which the defendants were seeking to establish legal right to possession of the said land at a late stage was specifically B governed by the Sabah Land Code ('SLC'). A genuine litigant who intended to obtain legal title must strictly follow the strict provisions of the SLC and any grievance by the decision of state authorities must be taken up usually by way of judicial review or by the appeal mechanism set out in the SLC. It is not proper to occupy state land in breach of any C of the provisions of the SLC and then raise equitable defences of sympathy evoking stories (see para 14(1)(b)).

(3) In relation to the second suit, the defendants by issuing a third party notice to the state government had candidly accepted the contention of the 28th plaintiff. Further, there was substantial delay in seeking the D said relief. In this case the defendants had only issued the third party notice on 4 June 2006 but the plaintiffs had commenced the action as early as 2003. This part of the delay in addition to others was not explained. This by itself was sufficiently fatal to grant the relief (see E para 14(2)).

[Bahasa Malaysia summary

Tuntutan plaintif-plaintif terhadap defendan-defendan di sini adalah F berkaitan dengan dua guaman dan subjek perkara pertikaian di antara pihak-pihak di dalam guaman pertama dan kedua adalah berkaitan dengan tanah yang dipegang di bawah surat ikatan hak milik No CL 095333378 bertempat di Sungai Menanggol, Sukau di dalam Daerah Kinabatangan, Sabah. Fakta penting kes ini adalah seperti berikut, pada tahun 1970, G di bawah Permohonan Tanah No 70090469, sekumpulan 27 orang (kebanyakan plaintif-plaintif yang dinamakan di sini) memohon untuk sebidang tanah di Sg Menanggol – Sukau, Kinabatangan. Permohonan tanah tersebut kemudiannya dibenarkan pada tahun 1973 oleh Jabatan Tanah dan Ukur. Pemohon-pemohon yang berjaya kemudian melantik seorang yang H bernama Abdul Khalik untuk menjadi wakil yang seterusnya telah melantik Nescajaya Sdn Bhd iaitu defendan kedua di dalam guaman pertama untuk menjadi wakil. Pada 3 Mac 1992 draf hak milik CL 095317856 telah dikeluarkan kepada pemohon-pemohon yang berjaya. Di sekitar tahun 1996, terdapat pertikaian berkenaan dengan surat kuasa wakil berkaitan dengan I defendan-defendan di dalam guaman pertama. Pada masa yang sama Penolong Pemungut Hasil Cukai, Kinabatangan ('PPHC') telah berkali-kali menulis dan mengeluarkan notis kepada defendan-defendan di dalam guaman pertama untuk mengembalikan draf hak milik, yang defendan-defendan tersebut telah gagal dan/atau enggan berbuat demikian

sehingga kini. Oleh itu, Pengarah Tanah dan Ukur menasihati PPHC melalui surat yang bertarikh 17 November 1998, bahawa LA 70090469 dan draf hak milik untuk CL 095317856 dibatalkan menurut Peraturan Tanah 2(5). Ini adalah untuk membolehkan waris-waris untuk mengemukakan permohonan tanah yang baru untuk tanah tersebut. Selepas daripada surat tersebut, LA 70090469 dan draf hak milik CL 095317856 tersebut dibatalkan. Waris-waris dan pemohon-pemohon yang berjaya yang masih tinggal adalah plaintif-plaintif yang dinamakan di dalam tindakan ini. Pada 15 Februari 2002, surat ikatan hak milik tanah tersebut yang bernombor CL 195333378 dikeluarkan kepada plaintif-plaintif. Di sekitar tahun 1991–2002, defendan-defendan di dalam guaman kedua juga telah memohon untuk tanah tersebut. Permohonan mereka tidak boleh diproses kerana tanah tersebut yang dipohon oleh mereka tidak ada lagi. Jelas bahawa tanah yang dipohon oleh defendan-defendan di dalam guaman kedua bertindih dengan tanah-tanah yang telah sebelum ini diluluskan untuk plaintif-plaintif. Melalui surat yang bertarikh 1 Julai 1993, permohonan tanah defendan-defendan di dalam guaman kedua telah ditolak. Walau bagaimanapun, meskipun menerima surat penolakan, defendan-defendan di dalam guaman kedua telah secara tidak sah memasuki dan mengusahakan tanah tersebut. Plaintif-plaintif mendakwa bahawa defendan-defendan telah secara tidak sah memasuki dan kini menghuni tanah tersebut, yang telah didaftarkan di atas nama plaintif ke 28. Mereka memohon, antara lain, untuk deklarasi bahawa plaintif ke 28 berhak untuk milikan kosong CL 095333378 dan bahawa defendan-defendan pertama dan/atau ketiga dan atau orang lain yang tidak dikenali oleh plaintif-plaintif yang secara tidak sah menduduki tanah tersebut memulangkan milikan kosong tanah tersebut kepada plaintif-plaintif. Defendan-defendan di dalam kedua-dua guaman juga telah memasukkan tuntutan balas untuk memohon relief-relief deklarasi yang pada asasnya untuk memegang milikan. Tambahan, defendan-defendan di dalam kedua-dua guaman juga memfailkan tindakan pihak ketiga terhadap kerajaan negeri untuk mencapai matlamat yang sama dan mengesahkan milikan mereka. Isu-isu yang dibangkitkan adalah, antara lain, sama ada plaintif-plaintif berhak terhadap hak milik dan pegangan tanah tersebut; sama ada plaintif-plaintif berhak terhadap apa-apa kehilangan dan ganti rugi berkaitan dengan tanah tersebut disebabkan oleh penghunian di tanah tersebut oleh defendan-defendan dan sama ada kemasukan, penghunian dan penanaman oleh defendan-defendan atas tanah tersebut, sah.

Diputuskan, membenarkan tuntutan plaintif-plaintif dalam kedua-dua guaman dengan kos, menolak tuntutan balas defendan-defendan ditolak tanpa perintah terhadap kos dan tuntutan defendan-defendan terhadap pihak ketiga ditolak dengan kos:

(1) Relief deklarasi adalah dalam budi bicara. Ia tidak boleh diberikan

A sewenang-wenangnya. Terdapat tanggungjawab dan kewajipan untuk menjelaskan kelewatan dalam memohon relief. Di dalam kes ini plaintif-plaintif telah memfailkan tindakan terhadap defendan-defendan di sekitar tahun 2003. Defendan-defendan mengeluarkan notis pihak ketiga hanya pada 13 Jun 2008. Kelewatan B tersebut tidak dijelaskan. Ini secara sendirinya adalah cukup menjejaskan untuk menolak relief tersebut (lihat perenggan 14(1)(a)).

(2) Sifat relief yang defendan-defendan pohon untuk membuktikan hak di bawah undang-undang untuk milikan tanah tersebut pada peringkat C yang lewat diperintah oleh Kanun Tanah Sabah ('KTS'). Litigan yang sebenar yang berniat untuk memperoleh hak milik sah mesti benar-benar mematuhi peruntukan ketat KTS dan apa-apa ketidakpuasan hati daripada keputusan pihak berkuasa negeri mesti dibawa secara umumnya secara semakan kehakiman atau secara rayuan D yang ditetapkan di dalam KTS. Ia tidak sewajarnya untuk menduduki tanah negeri dengan memungkiri peruntukan KTS dan kemudian membangkitkan pembelaan simpati dalam equiti dengan mereka cerita (lihat perenggan 14(1)(b)).

(3) Berkaitan dengan guaman kedua, defendan-defendan dengan E mengeluarkan notis pihak ketiga kepada kerajaan negeri telah terus terang menerima hujahan plaintif ke 28. Selanjutnya, terdapat kelewatan yang cukup lama dalam mendapatkan relief tersebut. Di dalam kes ini defendan-defendan hanya telah mengeluarkan notis pihak ketiga pada 4 Jun 2006 tetapi plaintif-plaintif telah memulakan F tindakan seawal tahun 2003. Bahagian kelewatan ini bersama-sama dengan yang lain tidak dijelaskan. Ini dengan sendirinya adalah cukup menjejaskan dalam pemberian relief (lihat perenggan 14(2)).]

Notes

G For cases on application for declaration, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3393–3396.

For cases on claim for ownership, see 8 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1779–2001.

H For cases on third party notice, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5167–5170.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ I 12; [1996] 2 CLJ 561, FC (refd)

Chong Wooi Leong & Ors v Lebbey Sdn Bhd [1998] 2 MLJ 644, CA (refd)

Hassnar bin Hj MP Ebrahim @ Asainar v Tapah bin Utong & 6 Ors, Civil Suit No S-22–07 of 1999, (unreported) HC (refd)

Hiew Kon Fah & Anor v Kwan Ngen Wah & Ors [2008] MLJU 95, HC (refd)

Ismail Yunus & Ors (for themselves and on behalf of others) v Syarikat Kerjasama Perkembangan Tanah Pegagau Bhd & Anor [1994] 4 CLJ 701, HC (refd)
Jekri Mohd Zinin & 4 Ors v Directors of Lands & Surveys Sabah & Anor [2007] 1 LNS 549, HC (refd)
Ng Kon Yu v Sakim bin Saiking [2006] 3 MLJ 533, HC (refd)
Nik Ibrahim bin Abdul Rahman v Pentadbir Tanah Jajahan Gua Musang & Ors [2001] 5 MLJ 59, HC (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the Estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1999] 2 AMR 1235, CA (refd)
Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah [1994] MLJU 398; [1994] 3 CLJ 229, HC (refd)
Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors [1982] 1 MLJ 313, FC (refd)
Trunkline Plantation Sdn Bhd v Sikitani Sdn Bhd, Case No 22–19 of 2004, HC (unreported) (folld)

Legislation referred to

Advocates Remuneration Rules 1986
Land Rules r 2(5), 2(9)
Rules of the High Court 1980 O 53 r 3(1), O 89
Sabah Land Ordinance ss 4(2), 6, 6(1), 9, 9(1), 13, 14, 41, 69, 88, 98
Specific Relief Act 1950 s 41

Govinda Raj (Raj & Co) for the plaintiffs in Originating Summons Nos 24–10 of 2003 and 24–11 of 2003.
Serena Liew (Lam Teo Sebom & Tan Advocates) for the defendants in Originating Summons No 24–10 of 2003.
Dennis Rantau (Martin Idang Rantau & Co) for the defendants in Originating Summons No 24–11 of 2003.
Diana Fadzillah (State Attorney-General's Chambers) for the third party in Originating Summons Nos 24–10 of 2003 and 24–11 of 2003.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiffs' claim against the defendants in respect of two suits. The claim by the plaintiffs against the defendants in Suit No 24–10 of 2003 as per the re-amended statement of claim reads as follows: (a) a declaration that the 28th plaintiffs entitled to vacant possession of CL 095333378; (b) that the first and/or third defendants and/or other persons unknown to the plaintiffs who have unlawfully occupied the land deliver vacant possession of the said land; (c) damages to be assessed for the defendants' trespass and illegal occupation of the said land; (d) and interests, costs, etc. Similar order is prayed in respect of Suit No 24–11 of 2003.

A **[2]** The defendants in both the suits have also mounted a counterclaim to seek declaratory reliefs in crux to hold to possession. In addition, the defendants in both the suits have also filed a third party action against the state government to achieve the same purpose and legitimatise their possession.

B

[3] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary C re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination witness D statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS (THE PLAINTIFFS' VERSION)

E

[4] The plaintiffs commenced this action by two Originating Summons No K-24–10 of 2003 and K-24–11 of 2003 to obtain vacant possession pursuant to O 89 of the RHC 1980. The defendants in both suits are different parties and the plaintiffs say they have unlawfully entered into and are currently F occupying the land known as CL 095333378 ('title') which is registered in the name of the 28th plaintiff. Counsel for the third party has summarised the facts eloquently as follows: (a) the plaintiffs are the registered owners of land held under Title Deed No CL 095333378 located at Sungai Menanggol, Sukau in the District of Kinabatangan, Sabah measuring 191.6 hectares ('the G said land'); (b) the subject matter of the dispute between the parties in the first and second suit is in respect of land held under Title Deed No CL 095333378; (c) in 1970, under Land Application No 70090469, a group of 27 persons (most of the plaintiffs were named therein) headed by Hj Abdul Karim bin Hj Shukor ('the successful applicants') applied for a piece of land H in Sg Menanggol-Sukau, Kinabatangan. The said land application was subsequently approved in 1973 by the Lands and Surveys Department. Subsequently, a letter of offer was issued to the successful applicants which was duly accepted by them; (d) from the record, the successful applicants appointed one Abdul Khalik bin Datuk OKK Hj Md Ugi ('Abdul Khalik') to I be their attorney. Later on, Abdul Khalik appointed Nescajaya Sdn Bhd ie, the second defendant in the first suit to be the attorney; (e) on 3 March 1992 a draft title CL 095317856 ('the draft title') was issued to the successful applicants. The draft title was collected by the agent of Nescajaya Sdn Bhd by the name of Jipius B Mogini @ Rayner. However, till date Nescajaya Sdn Bhd

never registered the draft title; (f) on or about 1996, there was a dispute concerning the power of attorney in respect of the defendants in the first suit. The Assistant Collector of Land Revenue, Kinabatangan ('ACLR, Kinabatangan') decided to hold a land enquiry to hear the dispute ('LE 34/97'). At the hearing of the LE 34/97, the ACLR, Kinabatangan incidentally discovered that several of the successful applicants to the said land had since passed away. Also, it was one of the reasons which prompted the ACLR, Kinabatangan then to hold a land enquiry. At the same time, the ACLR, Kinabatangan repeatedly wrote and issued notices to the defendants in the first suit to return the draft title, which he failed and refused to do so till date; (g) in view of the above, the Director of Lands and Surveys wrote to the ACLR, Kinabatangan vide a letter LS 901.1.72 Vol 1/114 PEA/ta dated 17 November 1998 to advise that the LA 70090469 and draft title for CL 095317856 be cancelled in accordance with the Land Rule 2(5) (GN 505 of 1930). This was to enable the heir/inheritors to submit new land applications for the said land; (h) subsequent to that letter, the ACLR, Kinabatangan held another land enquiry ('LE 05/2000'). At the LE 05/2000 herein, the ACLR, Kinabatangan ('TP2') had decided to cancel LA 70090469 and draft title for CL 095317856 to enable the heir/inheritors as well as the remaining successful applicants to submit new land applications in respect of the said land; (i) the heir/inheritors and the remaining successful applicants are the named plaintiffs in this action ('the plaintiffs'); (j) eventually, on 15 February 2002, title deed for the said land bearing No CL 095333378 was issued to the plaintiffs; (k) around 1990 to 2002, the defendants in the second suit have also applied for the said land. (l) the defendants in the second suit land applications could not be processed because the land applied for by the defendants was not available. This was evidenced by the District Surveyor, Sandakan letter addressed to the Assistant Collector of Land Revenue, Kinabatangan bearing reference No DSS/PT 90091089-1182/04 dated 3 July 1992; (m) apparently, the land applied for by the defendants in the second suit overlapped with the lands which have previously been approved to the plaintiffs; (n) by a letter dated 1 July 1993, the land applications of the defendants in the second suit was rejected; (i) however, despite the letter of rejection, the defendants in the second suit had unlawfully entered and cultivated the said land; (j) subsequently, as an afterthought, the defendants in the second suit claim NCR by way of the second suit. No application in accordance to the Sabah Land Ordinance, was ever made to the ACLR in respect of the NCR's claims.

[5] The statement of agreed facts and issues to be tried for the first suit, inter alia, reads as follows: (a) the first to 27th plaintiffs were the previous registered owners of a parcel of land held under Title Deed No CL 095333378 until 17 November 2003; (b) the first defendant, Mr Liew Vui Yin, is a businessman in the plantation sector and also a director of Nescajaya Sdn Bhd ('the second defendant') and Ableland Progress Sdn Bhd ('the third

defendant'); (c) a group of applicants ('the original applicants') had applied around 1970 for the said land under LA 70090469 and the Department of Lands and Surveys, Kota Kinabalu, had approved their applications by a 'letter of offer' dated 18 April 1973 under ref No LS 901.1.72/24A. The original applicants had on 30 April 1973 accepted the said offer; (d) 16 of the plaintiffs in this action were part of the group comprising the original applicants in LA 70090469. The other plaintiffs are the heirs or successors of the original applicants; (e) on or about 27 April 1973, the original applicants granted a power of attorney to one Abdul Khalik bin Datuk OKK Hj Mohd Ugi ('Abdul Khalik') to extract and sell timber from the said land. The said power of attorney was registered in the Magistrates' Court, Sandakan and numbered P/A 291/73; (f) the said Abdul Khalik entered into a sale and purchase agreement dated 26 May 1989 with the second defendant to sell the said land to the second defendant; (g) the said Abdul Khalik appointed the second defendant as his attorney (and the substituted attorney of the original applicants) by a power of attorney ('appointment of substitute') dated 17 September 1991 in respect of the said land; (h) the Draft Title No CL 095317856 was issued sometime in 1992 and the same was collected by the second defendant ('Nescajaya Sdn Bhd') or its servants or agent; (i) on 15 January 1998, the Assistant Collector of Land Revenue, Kota Kinabatangan, made a decision that the Draft Title CL 095317856 be returned to the original owners. By a letter dated 17 November 1998, the Deputy Director of Lands and Surveys Department recommended that the Draft Title CL 095317856 to be invalidated; (j) the Assistant Collector of Land Revenue, Kota Kinabatangan made another ruling on 5 April 2000 vide land enquiry (LE) No 05/2000 to invalidate draft title No CL 095317856; (k) the said land is presently occupied by the first and third defendants or their servants or agents; (l) the first to 27th plaintiffs had submitted their applications under PT 98091214 – PT 98091219, PT 99091704 – PT 99091724 based on the original plan under the invalidated title deed CL 095317856 (LS 90.1.72 Plan 09123030 – 191.6 hectares); (m) the first to 27th plaintiffs had assigned their rights, interests and power in the said land to the 28th plaintiff pursuant to powers of attorney or substituted power of attorney, all duly registered in the Magistrates' Court Sandakan (Nos 0537-02 to 0563-02 all dated 13 March 2002); (n) the land applications by the first to 27th plaintiffs under PT 98091214 – PT 98091219 and PT 99091704 – PT 99091724 was approved by the Director of Lands and Surveys, Sabah on 15 January 2002 and the title deed CL 095333378 was duly issued in the names of the first to 27th plaintiffs in respect of the said land; (o) on 17 November 2003, the said land was transferred to and registered in the name of the 28th plaintiff.

The issues to be tried, inter alia, reads as follows: (a) whether Abdul Khalik bin Datuk OKK Haji Mohd Ugi ('Abdul Khalik') had the power to: (i) appoint a substitute attorney; and/or (ii) sell the said land pursuant to the

power of attorney granted by the original land applicants to Abdul Khalik dated 27 April 1973 and numbered 291/73 in the Magistrates' Court, Sandakan; (b) whether the second defendant had acquired any interests or right s over the said land pursuant to the sale and purchase agreement dated 26 May 1989 between the said Abdul Khalik and the second defendant and the power of attorney dated 17 September 1991 given by Abdul Khalik to the second defendant; (c) whether the second defendant had the power or right to appoint the third defendant as its substituted attorney in respect of the said land; (d) whether the cancellation and/or invalidation of CL 095317856 by the ACLR Kota Kinabatangan on 15 January 1998 and/or on 5 April 2000 and/or by the Director of the Lands and Surveys Department was valid and proper; (e) whether the new applications made by the first to 27th plaintiffs under PT 98091214 – PT 98091219, PT 99091704 – PT 99091724 based on the original plan under the invalidated title deed CL 095317856 were valid and lawful; (f) whether the 28th plaintiff had acquired any interests or rights over the said land pursuant to the power of attorney or substituted power of attorney dated 13 March 2002 all registered in the Magistrates' Court, Sandakan; Alternatively, whether the power of attorney or substituted power of attorney dated 13 March 2002 and subsequently the approval of the said new land applications by the Director of Lands and Surveys, Sabah on 15 January 2002 were valid and lawful; (g) whether the first to 27th plaintiffs and/or the 28th plaintiff are entitled to possession of the said land; (h) whether the first to 27th plaintiffs and/or the 28th plaintiff are entitled to any damages in respect of the said land by reason of the occupation of the said land by the defendants.

[6] The statement of agreed facts and issues to be tried for the second suit reads as follows: (a) the first to 27th plaintiffs were the previous registered owners of a parcel land held under Title Deed No CL 095333378 until 17 November 2003; (b) a group of applicants ('the original applicants') had applied around 1970 for the said land under LA 70090469 and the Department of Lands and Surveys, Kota Kinabalu, had approved their applications by a 'letter of offer' dated 18 April 1973 under ref No L 5.901.1.72/24A. The original applicants had on 30 April 1973 accepted the said offer; (c) 16 of the plaintiffs in this action were part of the group comprising the original applicants in LA 70090469. The other plaintiffs are the heirs or successors of the original applicants; (d) the draft title No CL 095317856 was issued sometime in 1992; (e) on 15 January 1998, the Assistant Collector of Land Revenue, Kota Kinabatangan, made a decision that the draft title under CL 095317856 be returned to the original landowners. By a letter dated 17 November 1998, the Deputy Director of Lands and Surveys Department recommended that draft title CL 095317856 be invalidated; (f) the Assistant Collector of Land Revenue, Kota Kinabatangan made another ruling on 5 April 2000 vide Land Enquiry (LE) No 05/2000 to invalidate draft title No CL 095317856 under Land

A Rule 2(5) on the grounds that a number of the original applicants had passed away and ordered for the submission of a new application to enable the heirs/inheritors and the existing beneficial owners to submit their applications so that their applications would be processed in the usual manner; (g) the said land is presently occupied by the defendants or their B servants or agents; (h) the first to 27th plaintiffs had submitted their applications under PT 98091214 – PT 98091219, PT 99091704 – PT 99091724 based on the original plan under the invalidated title deed CL 095317856 (LS 90.1.72 plan 09123030 – 191.6 hectares); (i) the first to 27th plaintiffs had assigned their rights, interests and power in the said land C to the 28th plaintiff pursuant to powers of attorney or substituted power of attorney, all duly registered in the Magistrates' Court Sandakan (Nos 0537-02 to 0563-02 all dated 13 March 2002); (j) the land applications by the first to 27th plaintiffs under PT 98091214 – PT 98091219 and PT 99091704 – PT 99091724 was approved by the Director of Lands and Surveys, Sabah on D 15 January 2002 and the title deed CL 095333378 was duly issued in the names of the first to 27th plaintiffs in respect of the said land; (k) on 17 November 2003, the said land was transferred to and registered in the name of the 28th plaintiff.

E The issues to be tried, inter alia, read as follows: (a) whether the first to 27th plaintiffs and/or the 28th plaintiff are entitled to the ownership and possession of the said land; (b) whether the first to 27th plaintiffs and/or the 28th plaintiff are entitled to any losses and damages in respect of the said land by reason of the occupation of the said land by the defendants; (c) whether F the land title in draft title No CL 095317856 and/or CL 095333378 both in respect of the said land is null and void ab initio and of no legal effect in law; (d) whether the defendants were aware of the and application of the original land applicants and/or the subsequent land applications of their heirs/inheritors in respect of the said land and/or the approval of the same by G the relevant authorities; (e) whether the defendants are entitled to ownership over the said land by virtue of native customary rights; (f) whether the defendants had been served with or deemed to be served with a notice under s 13 of the Land Ordinance (Sabah) and/or whether it is a requirement in law that such s 13 notice must be served on the defendants by personal service. H If the answer is in the affirmative, whether the failure to effect personal service of s 13 notice on the defendants would result in the land title issued to the first to 27th plaintiffs becoming null and void ab initio and of no effect; (h) whether the defendants' entry, occupation and cultivation of the said land was lawful; (i) whether the approval of the first to 27th plaintiffs' application I by the Pengarah Tanah dan Ukur Sabah ('PTU') on 15 June 2002 and the subsequent issuance of the title deed is null and void ab initio and of no legal effect by reason that the PTU or Land Utilisation Committee had purported to approve the said land application beyond their power and jurisdiction when the said land application was to be approved by the Chief Minister; (j)

whether the first to the 28th defendants are entitled to any losses and damages for the loss of the said lots in the said land and for the costs and expenses of development of the said lots with oil palms against the first to the 27th plaintiffs and/or the 28th plaintiff and/or the third party.

[7] The third party notice for the first suit reads as follows: (a) a declaration that the letter dated 22 December 1997 is null and of no legal effect; (b) a declaration that the new applications made by the first to 27th plaintiffs under PT 98091214 – PT 98091219, PT 99091704 – PT 99091724 are null and void; (c) a declaration that the letter No LS 901.1.3184/vol 1/73 (SHJ) dated 15 January 2002 is null and void; (d) a declaration that the cancellation and/or invalidation of CL 09531 7856 by the ACLR Kota Kinabatangan under LE No 34/97 on 24 February 1998 and/or on 17 November 1998 by the Deputy Director of the Lands and Surveys Department are null and void; (e) a declaration that the cancellation and/or invalidation of the CL 095317856/PT 70090469 by the ACLR Kota Kinabatangan under LE 05/2000 on 5 April 2000 is null and void; (f) An order that the caveat lodged under Memorial No 20262544(02) dated 13 May 2002 be removed forthwith; (g) a declaration that the interests registered as Memorial No 20270660(03) dated 17 November 2003 is null and void; (h) an order that the title deed of CL 095317856 be registered under the name of the second defendant; (i) a declaration that the second defendant is entitled to possession of the said land; (j) an order that the title deed of CL 095333378 issued to the plaintiffs be revoked and/or cancelled; (k) alternatively, the sum of RM62,079 or any part thereof be refunded to the second defendant and/or the first defendant by the third party; (l) damages to be assessed; (m) further or in the alternative, general punitive and exemplary damages paid by the third party to the defendants for breach of contract by its servants and agents and damages for loss of opportunity and the full costs of the defendants' expenses incurred in developing the said land, to be assessed; (n) statutory interest at the rate of 8% per annum on the sum adjudged from the date of occupation, ie 30 August 1995 to the date of judgment; (o) statutory interest at the rate of 8% per annum on the sum adjudged from the date of judgment to the date of full payment; (p) costs inclusive of costs based on a solicitor and client indemnity basis pursuant to the Advocates Remuneration Rules 1988; and (q) any further or other relief which this honourable court deems fit and proper to grant.

[8] The third party notice for the second suit reads as follows:

> To: State Government, of Sabah.
>
> TAKE NOTICE that this action has been brought by the plaintiffs against the defendants. In the plaintiffs claim against the defendants that the defendants deliver vacant possession of the said land to the plaintiffs, damages to be assessed for the defendants' trespass and illegal occupation of the said land and to be paid

by the defendants to the plaintiffs, statutory interest at the rate of 8% per annum on the judgment sum from the date of judgment to the date of settlement, costs and any other relief and orders that the court deems fit as appears from the writ of summons a copy whereof is served herewith together with a copy of the statement of claim.

(1) The issue title in respect of the said land is null and void ab initio and of no legal effect to the extent inclusive of the said lots and you by your PTU, Sabah are to recall to the issue title for rectification to exclude the said lots of the said defendants from the issue title under the said Ordinance;

(2) you by your PTU, Sabah do issue the respective titles in respect of the said lots to the said defendants under part IV of the said Ordinance;

(3) you by your PTU, Sabah and/or the PPHT, Kota Kinabatangan have authorised and caused the said defendants to enter occupy and plant the said lots in the said land with oil palms;

(4) further or in the alternative you do pay to the defendants general damages to be assessed for the loss of the said lots and for the costs and expenses of development of the said lots with oil palms by the defendants, interest, costs and such other just, appropriate or equitable relief that this honourable court deems fit.

And take notice that if you wish to dispute the plaintiffs' claim against the defendants, or the defendants' claim against you, an appearance must be entered on your behalf within 10 days after the service of this notice on you, inclusive of the day of service, otherwise you will be deemed to admit the plaintiffs' claim against the defendants or to indemnify the defendants against the plaintiffs' claims and the costs of this action and will be bound by any judgment or decision given in the action, and the judgment may be enforced against you in accordance with O 16 of the Rules of the High Court, 1980.

[9] The third party defence gives a comprehensive answer to both the third party notice, which I do not wish to set out here.

PRELIMINARIES

[10] For the first suit seven witnesses gave evidence for the plaintiffs and three witnesses for the defendants and two witnesses for the third party. For the second suit seven witnesses gave evidence for the plaintiffs and two witnesses for the defendants and two witnesses for the third party. The facts and the manner the parties presented the case is much confusing and much judicial time has been wasted. However, upon careful perusal of the case as well as by reading the third party notices and the third party defence it will, without doubt, show the legal basis of the claim by the 28th plaintiff. During the course of trial, all the solicitors concerned managed to sort out various

issues inclusive of the agreed issues. I am grateful. It was also agreed that by deciding on the issues between the defendants and the third party the claim of all the parties can be effectively dealt with. In consequence though much was said about the validity and scope of power of attorney, I do not wish to deal with them as I have dealt with such powers in the case of *Trunkline Plantation Sdn Bhd v Sikitani Sdn Bhd*, High Court of Sibu Case No 22–19 of 2004 which will equally apply here. Further, many of the agreed issues to be tried have become academic in consequence of the agreed facts. Answering most of those questions per se will not entitle declaratory relief to the defendants in these suits. This is so because declaratory reliefs are discretionary reliefs and cannot be granted as of right. The legal jurisprudence on declaratory relief has been captured by the Court of Appeal in the case of *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the Estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1999] 2 AMR 1235, where Gopal Sri Ram JCA made the following observations:

> It is beyond dispute that the remedy of declaration is discretionary in nature.
>
> Section 41 of the Specific Relief Act 1950 reads as follows:
>
> > Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
> >
> > Explanation — A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee. (Emphasis added.)
>
> Although s 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v Zauyah Wan Chik 3 Ors* [1995] 2 AMR 1955) and the power to make a declaration is almost unlimited (*Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490, at p 507 per Lord Sterndale MR) yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v Government of Sarawak* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd v Lye Thai Sang* [1985] 2 MLJ 380) or other inequitable conduct (*City of London v Homer* [1914] 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik v Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

THE FIRST SUIT (THE DEFENDANTS' ARGUMENT)

[11] The defendants say: (i) the sale and purchase agreement between the land applicants and the 28th plaintiff is null and void for the following grounds: (a) the first letter of offer granted to the original land applicants in 1972 is still valid, (b) the first power of attorney granted to Abd Khalik is still valid and binding on the 27 land applicants, (c) the defendants had acquired the said land pursuant to the sale and purchase agreement dated 26 May 1989 executed by Abd Khalik, (d) draft title has been issued to the defendants based on the first power of attorney, etc; (ii) the first to 27th plaintiffs have fraudulently or wrongfully sold and subsequently transferred the said land to the 28th plaintiff.

THE SECOND SUIT (THE DEFENDANTS' ARGUMENT)

[12] The defendants say: (i) the land has not been alienated to the applicants issued with draft title CL 095317856 for want of registration. The defendants assert alienation takes effect only upon registration of title; (ii) the title in respect of the said land is null and void out of no legal effect to the extent it overlaps with the said lots, and asserts the said lots are deemed to have been earlier alienated to the defendants by virtue of NCR under the said Ordinance and therefore no longer available for alienation to the plaintiffs under the issue title and contends the said lots under NCR have the same status as a registered title; (iii) the defendants are not trespassers; the land at the material time was state land and the defendants planted oil palm and the third party or the first to 27th plaintiffs have not taken action for possession of the said lots from any of the defendants; (iv) the ACLR failed to serve a s 13 notice in respect of the first to 27th plaintiffs' application, was also in breach of natural justice; (v) the third party had failed to convene a land enquiry to determine the NCR claim of the defendants, and the court should exercise its discretion to do justice by declaring NCR in favour of the defendants and set aside the title in respect of the said lots and rectify the same; (vi) the purported approval of the said land is ultra vires the cabinet directions under s 9 of the said Ordinance which took effect on 18 June 1996, the PTU purported to approve the said land to the first to 27th plaintiffs on 15 January 2002; (vii) alternatively the defendants should be awarded damages.

THE FIRST SUIT (THE THIRD PARTY'S ARGUMENT)

[13] The third party says: (i) the defendants seeking a declaration that the letter dated 22 December 1997 is null and void is misconceived as the dispute must be resolved between Abdul Khalik and the defendants, and asserts the letter dated 22 December 1997 from the first defendant to Abdul Khalik and

copied to the Directors of the Lands and Surveys Department amongst others was to inform Abdul Khalik that the power of attorney dated 28 April 1973 was forged. Further, the lands and surveys department accepts power of attorney (PA) pursuant to s 98 of the Sabah Land Ordinance ('SLO') and if any dispute arise because of a forged PA, such dispute has to be resolved by the donor and donee of the PA; (ii) the defendants claim for a declaration that the new application made by the first to 27th plaintiffs under PT 98091214 – PT 98091219, PT 99091704 – PT 99091724 are null and void and misconceived. The third party asserts the said applications by the plaintiffs are in order and the provision of s 13 of the SLO which reads as follows:

> Upon the receipt of any application for unalienated country land it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.

has been complied with, and during trial it was established by the evidence given by TP1. In addition, the exercise of the power under s 9 was proper and valid. And asserts that the title was rightfully registered by the lands and surveys department on 2 May 2002 and in consequence the relief or remedy claimed by the defendants against the third party is baseless, unfounded and misconceived; (iii) the declaration for the letter No LS 901.1.3184/Vol 1/73 (SHJ) dated 15 January 2002 is null and void is misconceived as it was done according to the law and within the provisions of the SLO; (iv) the declaration that the cancellation and/or invalidation of the CL 095317856 by ACLR Kinabatangan on 24 February 1998 and/or 17 November 1998 is null and void is misconceived. And asserts that pursuant to land enquiry the ACLR, Kinabatangan order that the draft title kept by the second defendant to be returned to the original landowners is correct. Despite the said order the second defendant refused to return the said draft title and subsequently an order to cancel the draft title was in order and made according to the in particular r 2(5) of the Land Rules which says:

> The Collector may cancel any application if the applicant shall not have signed the title within six months of being called on to do so, or shall have left the district without leaving an address or appointing an agent to act on his behalf, or shall not have accepted within three months of their being communicated to him, any special conditions to be imposed.

(v) the declaration that cancellation of the draft title is null and void has also no merits. And asserts that defendants kept the draft title despite numerous notices from the collector to return the same and this is also supported by the evidence of PW4. Further, the defendants could have appealed against the said order pursuant to s 41 of the SLO which reads as follows:

41 Appeal

(1) An appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court:

Provided that no appeal shall be admitted —

(a) after the expiration of thirty days from the date of the order or decision appealed against;

(b) until the prescribed fees shall have been paid;

(c) if it is expressly provided that the order or decision shall be final or if any other form of appeal is prescribed;

(d) from any decision of the Director under section 9 of this Ordinance.

Jurisdiction of Courts barred.

(2) Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director.

But the defendants have not done so; (vi) the order for removal for the caveat dated 13 May 2002 is misconceived against the third party, and is irrelevant and purely academic, as it is no longer in force. Further, the declaration is in the nature of mandamus against the third party and in consequence ought to have obtained leave of court pursuant to O 53 r 3(1) of the RHC 1980. Further, such an application ought to be by way of judicial review; (vii) the declaration that the interests registered as Memorial No 20270660(03) dated 17 November 2003 is null and void is misconceived as it tantamount to compelling the third party to rectify its action, and is not permissible pursuant to s 4(2) of the SLO which reads as follows:

(2) Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director.

(viii) an order for the title deed to be registered under the name of the second defendant is misconceived and relies on the unreported case of *Hassnar bin Hj MP Ebrahim @ Asainar v Tapah bin Utong & 6 Ors*, Civil Suit No S-22–07 of 1999 where Richard Malanjum J (as he then was) observed:

> And even though there was a power of attorney signed it could not be said that it was an alternative to an executed memorandum of transfer as required. It should be noted that a power of attorney is one of the documents specified in the

restrictive terms of the Letter of Offer as incapable of transferring any rights or powers on the issuance of a title deed. Further it was disputed that the purchase price was paid in full at the time of signing of the sale and purchase agreement (exh P3). And the plaintiff could not produce any document to corroborate his assertion. But I think there is no quarrel that in the end the full sum was paid. However, I do not think it can be said that after the full payment the first defendant became a trustee for the plaintiff. There were still many uncertain factors at that point in time such as whether the title deed would be issued and whether the defendant would give his written approval for the transfer of the said land. As such at best I can be described the relationship of the plaintiff and the first defendant is that they were only parties to a contract of sale of the contingent interest of the first defendant in the said land and subject to the written approval of the fifth defendant as required by the restrictive terms in the letter of offer. And I say 'contingent interest' because the interest of the first defendant was yet to be registered under s 88 of the Ordinance. With the letter of offer the ownership of the said land should not be assumed regardless of payment of quit rent as in this case. (Emphasis added).

And asserts in reliance of the principle stated in the above case that the first defendant cannot assume that by entering into a sale and purchase agreement and being a purported power of attorney holder, they are the ultimate owner of the said land; (ix) the declaration that the second defendant is entitled to possession of the said land is misconceived as it is within the third party's jurisdiction that the alienation of land is vested with the directors of land and surveys and in particular s 9(1) of the SLO which states as follows:

(1) Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions in respect thereof to be set out in the title.

And relies on the case of *Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah* [1994] MLJU 398; [1994] 3 CLJ 229, where the appellant argued that there was a failure to comply with the rules of natural justice when the respondent decided not to issue the offer to alienate the land. On that point, the learned judge was of the opinion that:

... Whatever it is, when the respondent decided not to issue the offer to alienate land to the appellant, he was, as I ruled earlier, exercising a discretionary power under s 9 of the Ordinance for which the rules of natural justice do not pertain. There is no need to hear anyone when deciding whether or not to issue the offer to alienate land. It would have been a different matter if the appellant had already been issued the offer to alienate land and the respondent sought to revoke it; it is not the case here. There is also no merit in this ground.

Further, the third party contends that the defendants have not acquired any rights on the said lands pursuant to s 88 of the SLO which states:

A No new title and no dealing with claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this part.

(x) the order for the title to be revoked is misconceived for reasons stated above; (xi) the alternate prayer that the sum of RM62,079 or any part be refunded has no basis as SLO r 2(9) of the Land Rules states:

When an application has been cancelled by the Collector under sub rule (5) any sum paid by the applicant under sub rule (3) shall be forfeited to Government.

(xii) the other prayers claimed are not sustainable for reasons stated above. And asserts that they have acted in accordance with the provision of the SLO and in consequence the defendants are not entitled for any damage, statutory interest, costs or other relief.

D THE SECOND SUIT (THE THIRD PARTY'S ARGUMENT)

The third party in respect of prayer (a) which seeks an order that the said land was unlawfully alienated is misconceived and asserts for reasons stated above it was lawfully alienated to the plaintiffs according to SLO. And relies on the case of *Ng Kon Yu v Sakim bin Saiking* [2006] 3 MLJ 533 where it was stated:

... the licence and the native customary rights which the defendants have allegedly acquired cannot, therefore, conceivably subsist upon issuance of the titles to the said land in 1995 and 1996. The clear and unambiguous words used in s 88 render any claim to or interest in the said land invalid.

Further s 88 of the SLO states:

No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this part.

And relies on the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561, where the court held:

... Section 88 of the Ordinance which emphasises the paramount importance of registration as a condition precedent for the recognition of the validity of any new title to or dealing with or claim to or interest in any land, does imply the basic Torrens concept that title to or interest inland vests and divests only upon registration.

For reasons stated above the third party asserts that the plaintiffs are undoubtedly the registered owner of the said land. In addition, the said land never belongs to the defendants nor the defendants had any registrable interest; (ii) in respect of prayer (b) for an order the title is null and void is misconceived for reasons stated above as it was made in accordance with the SLO, in particular s 9(1) of the SLO, which states as follows:

(1) Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions in respect thereof to be set out in the title.

(See *Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah*(iii) prayer (c) for PTU, Sabah do issue the titles to the defendants is misconceived, and relies on s 6(1) of the SLO which states:

… no unlawful occupation of state land … for however long a period shall establish any right, title or interest in State Land … or create any right to demand little to search land from the government.

Further s 14 of the SLO provides that:

Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

In the instant case the defendants have not made any attempt to claim NCR though they allege that they were in occupation from 1989. The right procedure to make a claim for NCR is provided for under s 69 of the SLO which reads as follows:

Claims to land based upon customary tenure shall be decided by the Collector acting under section 82 subject to the appeal provided for in sections 41 and 84.

And relies on the case of *Ismail Yunus & Ors (for themselves and on behalf of ors) v Syarikat Kerjasama Perkembangan Tanah Pegagau Bhd & Anor* [1994] 4 CLJ 701 (HC) where the court held that, the plaintiffs' claim for a declaration that they are entitled to native customary rights over the 5,000 acres of land was misconceived and unsustainable. If the plaintiffs want to claim native customary rights, they must apply to the assistant collector of land revenue and not to the court which has been excluded by the Land Ordinance from exercising original jurisdiction.

Further the third party says that before the title was issued, notices under s 13 were published and exhibited but the land office Kinabatangan did not receive any claim from the defendants for native customary rights. The section does not require notice to be served personally, and relies on the case of *Hiew Kon Fah & Anor v Kwan Ngen Wah & 2 Ors* (Sandakan High Court Civil Suit No S-22–27 of 2007) where I have held as follows:

(b) In my view, on the facts of this case, I think there is much merit in the plaintiff's submission that by entering the lands the occupants had infringed s 6 of the SLC and under sub-s (2) adverse possession for any length of time shall not bar the owner or any other person entitled to an interest there on, to institute an action for recovery

notwithstanding, the limitation period. Unlawful occupation is much condemned under the legislation and the court is duty bound not to recognise such rights.

(iv) the order in prayer (d) that PTU, Sabah has authorised the defendants to enter and plant in the said lots is misconceived as DW4 has never admitted that he had given any encouragement of any sort to the defendants to enter, occupy or cultivate the said land. As such, evidence by DW5 that DW4 had encouraged the defendants to enter, occupy and cultivate the said land is misconceived and untrue. In consequence the third party asserts that the defendants have unlawfully occupied and cultivated the said land. And relies on the case of *Chong Wooi Leong & Ors v Lebbey Sdn Bhd* [1998] 2 MLJ 644 where the Court of Appeal held:

> Section 40 of the National Land Code 1965 ('the Code') vests solely in the State Authority the entire property in all state land within the territories of the state the rights to which have not been specifically disposed of by the State Authority. The definition in s 5 of the Code further denotes that the consent or licence can only come from the Ruler or Governor, as the case may be, and as the land here is situated in the State of Selangor, it must mean the Ruler. A licence or consent from any other person, therefore, certainly would not suffice. In these circumstances, it was clear that all promises made to the appellants, who had never been given any temporary occupation licence by the State Authority, in whatever manner, by either the district officer, village headman, elected representative or the like, indicating that they had a right to occupy or continue to occupy the land, fell short of the requirement of the licence and consent from the State Authority as defined in s 5 of the Code ...

(v) further the alternative prayer for damages is misconceived as the defendants have not been given any permission or authorisation to enter the said land. And relies on the case of *Nik Ibrahim bin Abdul Rahman v Pentadbir Tanah Jajahan Gua Musang & Ors* [2001] 5 MLJ 59, to say that trespassers should not be awarded damages and everything planted on the lands belonged to the registered owners, unless there is evidence to the contrary. And relies on the case of *Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313, where the Federal Court held that trespassers have no rights in law or in equity against the registered owner which the trespassers had planted and enjoyed the benefit over the years.

Further, the third party says, the relief sought by the defendants is in the nature of mandamus for which leave must be obtained from the court.

The third party summarised the argument in respect of the first suit as follows: (a) a mere PA does not amount to a memorandum of transfer (s 88 of the SLO); (b) the defendants in the first suit have failed to sign and return the draft title as required under the law (r 2(5)); (c) payment does not confer any right or ownership on the said lands (r 2(4)); (d) the Director of Lands

and Surveys has discretion under s 9 of the SLO; (e) the issue of PA and any other transactions are matters purely between the parties and do not concern the third party at all; (f) the proper action, if at all, is by way of a judicial review as opposed to the present suit.

In respect of the second suit the third party summarised as follows: (a) pursuant to the provisions of the SLO, no NCR was acquired by the defendants in the second suit; (b) mere land applications does not confer any rights (r 2(4)); (c) power to alienate land lies with the Director of Lands and Surveys and not the ACLR (s 9); (d) estoppel is not applicable; (e) entering a state land without permission is wrong in law (s 6 of the SLO); (f) alienation of land by the Director of Lands and Surveys is non-appealable (s 41(1)(d)); and prays that the third party suit be dismissed with costs.

[14] I have heard the evidence, read the documents and submissions of the parties in detail. I take the view the plaintiffs' claim in both suits must be allowed and the defendants' claim against the third party must be dismissed inclusive of the defendants' counterclaim. My reasons are as follows:

First Suit (OS No 24–10 of 2003)

(1) The defendants in the first suit by issuing a third party notice to the State Government had candidly accepted the contention of the 28th plaintiff. However, the declaratory relief sought against the third party prima facie cannot be entertained by the court for reasons advanced by the third party. In this context I accept the submission of the third party and hold as follows:

(a) declaratory relief are discretionary in nature. It cannot be granted as of right (see s 41 of the Specific Relief Act 1950). There is a duty and obligation to explain the delay in seeking the relief. In this case the plaintiffs had filed the action against the defendants sometimes in 2003. The defendants had only issued the third party notice on 13 June 2008. The delay was not explained. This by itself is sufficiently fatal to refuse the relief (see *Saakap*'s case)

(b) the nature of relief which the defendants are seeking to establish legal right to possession of the said land at a late stage is specifically governed by the SLC. A genuine litigant who intends to obtain legal title must strictly follow the strict provision of SLC and any grievance by the decision of state authorities must be taken up usually by way of judicial review or by the appeal mechanism set out in the SLC (if any). It is not proper to occupy state land in breach of any of the provision of the SLC. It is also wrongful to occupy the state in breach of the SLC and raise equitable defences of sympathy evoking stories. I have dealt with this area of law in detail in the case of *Hiew Kon Fah & Anor v Kwan Ngen Wah & 2 Ors* and *Jekri bin*

Mohd Zinin & 4 Ors v Directors of Lands & Surveys Sabah & Anor [2007] 1 LNS 549. I do not wish to repeat the same in this instance.

(c) It is my finding that the plaintiffs have established their claim as pleaded and I do not find any reason to disbelieve the plaintiffs' version or reject their submission. Further, the submission of the plaintiffs is supported by the submission of the state, and based on sound legal jurisprudence.

(d) For reasons stated above, I allow the plaintiffs' claim and make the following orders:

(i) the 28th plaintiff is entitled to vacant possession of the said land known as CL 095333378.

(ii) the defendants and/or other persons unknown to the plaintiffs who have unlawfully occupied the said land hand over possession of the said land to the 28th plaintiff and the delivery of vacant possession shall be made within (30) days from the date of this order.

(iii) the deputy registrar to assess damages for trespass to the said land and grant interest at 8% per annum from the date of the filing of the writ until date of realisation, and the said sum to be paid to the 28th plaintiff.

(iv) the defendants to pay the plaintiffs the costs of this action. The getting up fees shall not exceed RM100,000. If costs cannot be agreed the plaintiffs are at liberty to tax the costs.

(v) the defendants' counterclaim against the plaintiffs is dismissed with no order as to costs.

(vi) the defendants' claim against the third party is dismissed with costs. The getting up fees shall not exceed RM50,000. If costs cannot be agreed the third party is at liberty to tax the costs.

Second Suit (OS No 24–11 of 2003)

(2) The defendants in the second suit by issuing a third party notice to the State Government again have candidly accepted the contention of the 28th plaintiff. The nature of the relief sought by the defendants is one which the court in this action will not ordinarily grant in view of the relevant provision in SLC. Further, the declaratory relief sought against the state prima facie cannot be entertained for reasons advanced by the state. In this context I accept the submission of the third party and hold as follows:

(a) a declaratory relief is discretionary in nature. It cannot be granted as of right. Further, there was substantial delay in seeking the said

relief. In this case the defendants had only issued the third party notice on 4 June 2006 but the plaintiff had commenced the action as early as 2003. This part of the delay in addition to others were not explained. This by itself is sufficiently fatal to grant the relief.

(b) the nature of the relief which the defendants are seeking to establish legal right to possession of the said land that too at a late stage, is specifically governed by the SLC. That procedure and the relief cannot be dealt in this action. It is wrong in law to occupy the state land in breach of any of the provision of the SLC (see *Hiew* and *Jekri*'s case)

(c) It is my finding that the 28th plaintiff is entitled to the vacant possession of the land from the defendants. I accept the plaintiffs' evidence and see no reason to reject their submission which is supported by the submission of the state and which is also based on sound legal jurisprudence.

(d) For the reasons stated above, I allow the plaintiffs' claim and make the following orders:

(i) the 28th plaintiff is entitled to vacant possession of the said land, known as CL095333378.

(ii) the defendants hand over possession of the said land to the 28th plaintiff and the delivery of vacant possession shall be made within (30) days from the date of this order.

(iii) the registrar to assess damages for trespass to the said land and grant interest at 8% per annum from the date of filing of writ until the date of realisation and the said sum to be paid to the 28th plaintiff.

(iv) the defendants to pay the plaintiffs the costs of this action. The getting up fees shall not exceed RM100,000. If costs cannot be agreed the plaintiffs are at liberty to tax the costs.

(v) The defendants' counterclaim against the plaintiffs is dismissed with no order as to costs.

(vi) The defendants' claim against the third party is dismissed with costs. The getting up fees shall not exceed RM50,000. If costs cannot be agreed the third party is at liberty to tax the costs.

A I hereby order so.

Plaintiffs' claim in both suits allowed with costs. Defendants' counterclaim dismissed with no order as to costs and claim against third party dismissed with costs.

B

Reported by Ashgar Ali Ali Mohamed

C

D

E

F

G

H

I